IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ORIGINATING SUMMONS NO. 701 OF 1993

IN

SUIT NO. 1264 OF 1993

Shreemati Ambalal Kilachand and Ors. ..... Plaintiffs
versus
Rajnikant Ambalal Kilachand and Ors. ..... Defendants

Mr. Pravin Diwan with Ms. S.D. Nanavati i/b. D.H. Nanavati for the plaintiffs.

Mr. Gautam Patel with Mr. Toral Shah i/b. Tyabji Dayabhai for defendant no. 1(a).

Mr. F. Sethna a/w. Ms. Dipti Das i/b. Dunmorr Sett Advocates for defendant nos. 1(b) and 5.

CORAM: S.U. KAMDAR, J.

DATE : 2ND FEBRUARY, 2005.

P.C. :

1. The present originating summons has been taken out under the provisions of Rule-238 of the High

Court (O.S.) Rules for interpretation of Clause-9 and 10 of the last will and testament of the deceased Ambalal Kilachand. Some of the few facts in the present case are briefly enumerated as under :

2. On 12.9.1985 Ambalal Kilachand executed his last will and testament. Under clause- 9 and 10 of the said last will and testament the testator created the life interest in favour of his wife Mrs. Shreemati Ambalal Kilachand for the user of the flat bearing no. 1-A, Sunita Building Malabar Hill, Bombay-400 006. In the said last will of the deceased it was inter-alia provided that she will be entitled to use, occupation and possession of the said premises subject to payment of society charges, however she will not be liable for payment of any rent towards her occupation in respect of the said flat. The said clause-9 also provides that after her death the executors of the said will, shall sell the said flat and donate the sale proceeds as and by way of capital donation to a public charitable trust formed by the testator known as ‘Ambashree Charity Trust’. The said donation should be effected by the

executors to the said charitable trust upon such terms and conditions as the executors think fit and proper. Under clause-10 the deceased has bequeath as capital donation realisation of all his investments such as shares, securities, fixed deposits, bank deposits etc held by the deceased in his capacity as a under-writing member of Llyods of London and all other moneys, shares and securities held by him or on his behalf in or as Lloyds deposits premium trust fund, special reserve fund, personal reserve etc to the said Ambashree Charity Trust'.

3. These two clauses are required to be interpreted by me in the present originating summons. The said clause-9 and 10 of the said will reads as under :

> "9. My wife Shreemati shall during her life be entitled to use my flat no.1/A in Sunita in Ridge Road, (Bal Gangadhar Marg), Malabar Hill, Bombay-400 006 as her residence without payment of any rent but subject to payment of society charges and on and after her death my executors shall sell the said flat and donate as capital donation the net sale proceeds thereof to the Public Charitable Trust formed by me and known as Ambashree Charity Trust upon such terms and conditions as my Executors think fit.

> 10. I hereby bequeath as and by way of capital donation to Ambashree Charity Trust upon such terms and conditions as my Executors think fit all my assets such as shares, securities, fixed deposits, bank deposits etc. held by me in connection with my membership as an underwriting member of Lloyds of London including all moneys, shares, securities held by me or on my behalf in or as Lloyds Deposit, Premium Trust Fund, Special Reserve Fund, Personal Reserve etc."

4. The said Ambalal Kilachand expired on 12.8.1987 leaving behind his last will and testament dated 12.9.1985. A Probate Petition no. 274 of 2003 was filed in this court for the said last will and testament of the deceased and this court has issued a probate on 9.1.1990.

5. The question of interpreatation which is raised by the plaintiff in the present originating summons is that the word appearing in Clause-9 namely Ambashree Charity Trust refers to an existing trust and/or in view of the fact that there was no trust standing in the aforesaid name the executors were entitled in law to float another charitable trust of

the same name and give effect to the said clause-9 and 10 of the will. It is an admitted position before me that on 5.11.1980 a public charitable trust was floated by the testator which was known as Ambashree Foundation and as on the date of the execution of the will i.e. 12.9.1985 the said trust was in existence and was duly registered as a public charitable trust under the Bombay Public Trust Act, 1950. According to the learned counsel for the plaintiff the use of the word Ambashree Charity Trust in clause-9 and 10 of the will is very significant and the same does not refer to existing trust i.e. ‘Ambashree Foundation’ because the testator has not used the word foundation but has use the word ‘charity trust’. It is further submitted that the testator having been aware that the name of trust floated by him being ‘Ambashree Foundation’ a departure made by him while making the will and changing the name from Ambashree Foundation to Ambashree Charity Trust indicates the intention of the testator not to give the donation of sale proceeds of the assets mentioned in Clause-9 and 10 of the will in respect of the said flat to Ambashree

Foundation but an intention was to create a new trust named as Ambashree Charity Trust and the said donation should be given to such newly floated trust. According to the learned counsel for the plaintiff, since there was no such trust in existence as on the date of grant of probate on 9.1.1990 the plaintiff including the wife of the deceased floated a new charitable trust on 17.7.1991 and duly registered the same in the name of ‘Ambashree Charity Trust’ with the Charity Commissioner, Greater Bombay Region, Maharashtra. It is his case that once a new trust is formed, the said clause-9 and 10 should be given effect by permitting the sale of the flat and sale proceeds should be transferred to the newly formed trust known as ‘Ambashree Charity Trust’. Learned counsel for the plaintiff contended that the intention of the testator was not to effect capital donation under clause-9 and 10 to Ambashree Foundation and the same is clear because the testator while executing the will was aware that there is such trust is in existence and inspite of the knowledge the testator has not use the word ‘Ambashree Foundation’ but as deliberately used the words

‘Ambashree Charity Trust’. According to the learned counsel for the plaintiff from the aforesaid fact it is clear that the intention of the testator was not to give any capital donation to Ambashree Foundation and therefore in deterence to the wish of the testator the plaintiff and the executors alongwith the deceased wife of Ambalal Kilachand has rightly formed a new charitable trust known as ‘Ambashree Charity Trust’ and thus the capital donation as bequeathed by the deceased testator must necessarily affected in favour of the new trus formed by them and not in favour of Ambalal Foundation. therefore the bequeath of the sale proceeds in respect of the said flat should be permitted to be made to Ambashree Charity Trust. In support of the aforesaid contention the learned counsel for the plaintiff has also contended that the intention is further clear from the fact that the lawyer who attested the will as well as the lawyer who formed the charitable trust was one and the same and thus he was aware of the wish of the testator while executing the will and thus clause-9 and 10 should be so interpreted.

6. On the other hand the learned counsel for defendants no.1(a), no.1(b) and 5 have contended that from the plain and simple reading of clause-9 and 10 it is clear that the intention of the testator was to give donation of the sale proceeds of the said flat to the existing charitable trust which was in existence at that time in the name of Ambashree Foundation. Merely because the words used as ‘Charity Trust’ in the place of ‘Foundation’ will not indicate that the testator was not inclined to give donation to the existing trust but wanted a new trust to be floated by the executors. They further contended that on the contrary clause-9 and 10 specifically makes it clear that the donation should be given to public charitable trust formed by the testator himself and not to a new charitable trust floated by other persons. In view thereof according to the learned counsels for defendants no.1(a), no.1(b) and 5, the true and correct meaning of clause-9 and 10 is to give sale proceeds of the sale of flat as well as other donations as contemplated thereunder to Ambashree Foundation and not to the subsequently newly floated trust in the name of

Ambashree Charity Trust.

7. Before I deal with the rival submissions of the parties I must first revist the principles which are involved in the interpretation of the will which I have already dealt with the same in my judgment delivered in Originating Summons no.309 of 2003 in Suit no. 686 of 2000 and Originating Summons no. 447 of 2003 in Suit no. 738 of 2003 dated 19.1.2005. By relying upon the various judgments of the Apex Court I have held that the intention of the testator should be carved out from the plain and simple language used in the will and the court must consider the intention of the testator by placing itself in the position of the testator himself on the date of execution of the said will. Keeping the said principles in my mind, in the present case on a plain reading of clause-9 and 10 it is clear that at the time of the execution of the will the testator was aware that there is a charitable trust which was formed by him and which was in existence. Thus the intention of the testator was to give the donation to an already existing charitable trust and it is also

clear that the testator was aware that the said trust has ben floated by himself. Mereby becuase while describing the said trust the testator has used the words ‘Ambashree Charity Trust’ inplace and instead of ‘Ambashree Foundation’ it is not possible to infer that the intention of testator was to form a new public charitable trust and the existing charitable trust should be ignored. From the reading of Clause-9 and 10 I am unable to carve out any such intention of the testator that a new charitable trust should be formed in the name of Ambashree Charity Trust and thereafter the sale proceeds as well as other investments should be bequeath to such newly formed charitable trust. While using the words Ambashree Charity Trust the intention of the testator was only to indicate that the said amount must be donated to a public charitable trust which is formed by himself. In view thereof I am unable to accept the contention of the learned counsel for the plaintiff that the executors were right and justified in forming a separate trust on 17.1.1991 after obtaining the probate of the will on 9.6.1990 in the name of Ambashree Charity Trust to give effect to the

intention of the testators contained in clause-9 and 10 of the said last will and testament dated 12.9.1985. In the aforesaid view the sale proceeds of the flat being flat no.1A in Sunita Building as well as all other investments and fixed deposits, shares and securities mentioned in clause-9 and 10 thereof must be realised by the plaintiff and be bequeathed and donated to Ambashree Foundation which was a trust in existence at the time of execution of will as a public charitable trust.

8. In the aforesaid circumstances, I dispose off the Originating summons by holding that the bequeath under clause-9 and 10 must go to Ambashree Foundation and direct the plaintiffs and executors to give effect to the provision of the said will and administer the estate accordingly. Plaint and Originating Summons both stand disposed off accordingly. There shall be no order as to costs.

sd/-

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